

200 KAR 5:315. Disciplinary action for failure to perform.

RELATES TO: KRS 45A.080, 45A.085, 45A.185, 45A.190, 45A.230, 45A.325

STATUTORY AUTHORITY: KRS 45A.035(2)(b)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 45A.035 authorizes the Secretary of the Finance and Administration Cabinet to promulgate administrative regulations for the implementation of the Kentucky Model Procurement Code (KRS Chapter 45A). KRS 45A.035(2)(b) requires the cabinet to promulgate administrative regulations governing prequalification, suspension, debarment, and reinstatement of prospective bidders. This administrative regulation establishes those requirements.

Section 1. Any bidder or contractor to the Commonwealth of Kentucky who, except for good cause shown, shall have committed, or failed to perform, as the context may require, one or more of the following acts or omissions, may be subject to disciplinary action by the Finance and Administration Cabinet as set forth in Section 2 of this administrative regulation. Specific grounds for disciplinary action shall include:

- (1) Failure to post bid or performance bonds, or to provide alternate bid or performance guarantee in a form acceptable to the purchasing agency in lieu of a bond, as required by a solicitation;
- (2) Substitution of commodities without the prior written approval of the purchasing agency;
- (3) Failure to comply with the terms and conditions of a solicitation or contract, including failure to complete performance within the time specified in the contract;
- (4) Failure to replace inferior or defective materials, supplies or equipment immediately after notification by the purchasing agency or the agency to which the materials, supplies, or equipment have been delivered;
- (5) Refusal to accept a contract awarded pursuant to the terms of a solicitation, or following the close of competitive negotiations;
- (6) Falsifying invoices, or making false representations to any state agency or official, about any payment under a contract, or to procure award of a contract, or to induce a modification in the price or the terms of a contract to the contractor's advantage;
- (7) Collusion or collaboration with another bidder or other bidders in the submission of bids for the purpose of reducing competition;
- (8) Failure to report, or to pay the Kentucky Revenue Cabinet any sales or use taxes as may be due in connection with a procurement contract as provided by law; and
- (9) Failure to comply with the prevailing wage law requirements of state or federal laws as may be applicable to any public works contract of the Commonwealth or any political subdivision or public authority.

Section 2. (1) Any contractor determined to have committed any act prohibited, or to have failed to perform any act required by Section 1(1) to (5) of this administrative regulation may, in the discretion of the commissioner of the department having jurisdiction over the procurement, be placed on probation, or suspended from bidding to the Commonwealth of Kentucky, or a combination of suspension from bidding and probation, for not more than twelve (12) months.

(2) Any contractor determined to have committed any act prohibited by Section 1(6), (7), or (8) of this administrative regulation may, in the discretion of the commissioner of the department having jurisdiction over the procurement, be placed on probation, or suspended from bidding to the Commonwealth of Kentucky, or a combination of suspension from bidding and probation, for not more than twenty-four (24) months.

(3) Any contractor, or any subcontractor to a contractor, determined by the Labor Cabinet to have violated the prevailing wage requirements of KRS Chapter 337 shall be suspended from bid-

ding to the Commonwealth of Kentucky, or participating in a public works contract of the Commonwealth of Kentucky, effective on the date the Finance and Administration Cabinet receives notice from the Labor Cabinet that the contractor or subcontractor has been determined to have violated the prevailing wage law, and until the time the Labor Cabinet has determined the contractor or subcontractor to be in compliance with the requirements of the law.

Section 3. Except for the grounds stated in Section 1(5) and (9) of this administrative regulation, a preliminary written determination shall be made concerning the facts of any allegation or claim that a bidder or contractor has either committed an act prohibited, or failed to perform an act required, by Section 1 of this administrative regulation before any disciplinary action is taken against the contractor. The preliminary determination shall be submitted to the General Counsel of the Finance and Administration Cabinet, for review prior to the administration of any disciplinary action as authorized by Section 2 of this administrative regulation. Notice of disciplinary action shall be sent to the bidder or contractor at the address shown in the cabinet's records by certified mail, return receipt requested.

Section 4. A bidder or contractor against whom disciplinary action has been taken under this administrative regulation may appeal the action to the Secretary of the Finance and Administration Cabinet. The appeal shall be filed in the office of the secretary within ten (10) working days after the date of notice of the disciplinary action has been received by the bidder or contractor as shown by the certified mail receipt. The appeal shall be filed in writing and shall state facts showing cause why the disciplinary action should be set aside. An appeal constituting a general denial of the charges contained in the notice of disciplinary action, unless supported by specific facts rebutting the charges, shall be preemptorily dismissed. The appellant may request either a formal hearing pursuant to KRS Chapter 13B, or an informal hearing to be conducted by the commissioner of the department having jurisdiction over the particular procurement activity or function, or his designee. A written report of the substance of the matters raised in an informal hearing shall be prepared and submitted to the secretary recommending that the appeal be sustained or denied. The rules of evidence shall not apply in informal hearings conducted under this section and any matter considered pertinent to the issues of the hearing shall be admissible.

Section 5. No purchase shall be made by any state agency from a bidder or contractor who has been suspended from bidding. All state agencies shall be promptly informed about bidders or contractors suspended from bidding.

Section 6. The administration of disciplinary action against a bidder, potential bidder or contractor under this administrative regulation shall not preclude the taking of other action by the Commonwealth, based on the same facts, as may be otherwise available, either at law or in equity, including suits for damages or actions for specific performance. (5 Ky.R. 579; Am. 952; 6 Ky.R. 11; eff. 7-17-79; 18 Ky.R. 1367; eff. 1-10-92; 30 Ky.R. 683; 1469; eff. 1-5-2004.)